

and an upper layer. The base layer includes solid food pieces in a gravy wherein the gravy includes about 20% to about 40% by weight of the base layer. The upper layer includes a substantially solid foodstuff which is about 20% to about 80% by weight of the pet food product wherein the base layer and the upper layer remain stratified before serving and the upper layer supports the base layer upon inversion.

Claim 10 relates to a process for producing a canned pet food product having at least two layers. The process includes the steps of filling a base layer and an upper layer into the can; sealing the can and retorting the sealed can. The base layer includes solid food pieces in a gravy wherein the gravy has a viscosity ranging from about 350 to about 1,000 centipoise and forming about 20% to about 40% by weight of the base layer. The upper layer includes a settable foodstuff that has a viscosity ranging from about 2500 to about 4000 centipoise. Upon cooling, a substantially solid foodstuff is formed wherein the settable foodstuff includes about 20% to about 80% by weight of the upper and base layers and the base layer and the upper layer remain stratified in the can such that the upper layer supports the base layer upon inversion.

In this regard, the solid layer is inherently more stable and thus reduces the risk of creating a mess upon opening the can because the solid layer is deposited from the can first and the solid pieces and gravy are then deposited on the solid layer. If the order were reversed, the solid layer would be deposited on the solid pieces and gravy which could then cause at least some of the gravy to splatter, thus creating a mess. The consumer is therefore presented with an attractive layer of solid food pieces in gravy above a clearly defined layer of a substantially solid foodstuff. See, Specification, page 2, lines 20-22.

In contrast, the cited art, even if combinable, fails to disclose or suggest a number of features of the claimed invention. For example, nowhere does the cited art disclose or suggest canned pet food that includes a base layer with solid food pieces in a gravy and an upper layer with a substantially solid foodstuff wherein the base layer and the upper layer remain stratified before serving and wherein the upper layer supports the base layer upon inversion.

At the outset, the references primarily relied upon are clearly deficient with respect to at least these features of the claimed invention. For example, *Ohba* merely discloses that different food varieties in substantially homogeneous mixtures can be canned. This type of product purports to prevent a pet from becoming satiated thus encouraging the pet to eat the food and

prevent waste thereof.

However, a chunk and gravy type pet food would not enable the layers of *Ohba* to remain together as a homogeneous, consistent mixture of food. As shown in Figure 2, if a chunk and gravy type pet food were placed in the middle layer, the layers would be unstable and move apart. Also, if the pet chunk and gravy type food were placed on the top layer, a utensil would necessarily be required to scoop the food out of the can. Otherwise, the layers of the pet food product would fall apart when placed on a plate or a bowl.

This is a clear teaching away from the claimed invention that requires the use of solid food pieces in a gravy base layer. Indeed, a chunk and gravy type food layer would necessarily reduce the ability to vary the order of layers and to maintain the order of layers for the pets. This goes against one of the very objects of *Ohba*.

To remedy the deficiencies of *Ohba*, the Patent Office further relies on Applicants' alleged admissions and the *Poppel* reference. Contrary to the Examiner's position, the solid meatloaf products and chunk-type products as disclosed in the Applicants' specification are meatloaf products that encase the chunk product and thus do not include separate layers as required by the claimed invention.

Moreover, the Patent Office still fails to address the importance of the gravy which accompanies the chunks. The gravy contains fat which provides nutrients, moisture and palatability which is a feature not disclosed in Applicant's admission. Accordingly, the citation to this alleged admission of prior art does not remedy the deficiencies of *Ohba*. Modifying *Ohba* based on the alleged admission would not result in a multi-layer product having specifically textured layers which serve distinct functions. Indeed, modifying *Ohba* based on the alleged admission would still teach away from the claimed invention.

Nor does *Poppel* remedy the deficiencies of *Ohba* even in combination with the alleged admission. *Poppel* merely relates to formulated emulsion products in a loaf-like form. The products are cut into chunks to form a meat-like product. The very purpose of the product is to make a meat-like product with relatively high moisture content that is desirable to pets. Contrary to the Patent Office's position, the *Poppel* pet products are clearly different than the pet food product required by the claimed invention.

For example, *Poppel* describes a solid loaf that is formed by cooking a loaf product

mixture and then filling the mixture with chunks (e.g., solid food pieces). See, *Poppel*, Example 1, column 6, lines 53-54. Thus, the chunks are incorporated into the loaf and not supported by the loaf and then placed in the cans. This clearly suggests that Example 1 in no way discloses or suggests forming upper and base product layers that remain stratified in a can where the upper layer supports the base layer upon inversion.

Further, *Poppel* refers to a chunk in gravy mixture that is filled into cans. The chunk in gravy mixture, however, is not formed into stratified layers in the can. See, *Poppel*, examples 2-5, column 7, lines 37-62. Thus, nowhere does *Poppel* disclose or suggest a pet food canned product that has a stratified upper layer of solid foodstuff and a base layer of solid food pieces in gravy where the upper layer supports the base layer upon inversion of the can as required by the claimed invention. Therefore, Applicants believe that *Ohba*, *Poppel* and Applicants' alleged admissions, alone or in any hypothetical combination, are clearly deficient with respect to a number of features of the claimed invention.

Further, Applicants do not believe that the remaining references relied on can remedy the deficiencies of *Ohba*, *Poppel* and Applicants' alleged admissions. At the outset, the *Docker* reference has been newly cited to support this rejection. However, nowhere does *Docker* disclose or suggest an upper layer of substantially solid foodstuff and a base layer of solid food pieces in a gravy such that upon inversion the upper layer supports the base layer.

To the contrary, *Docker* discloses a pudding-type layer as the base layer in the can wherein the top layer includes a liquid layer prior to serving. The container is then lifted from the tableware such that the liquid and solid layers can be removed from the bottom of the container as shown in Figure 3. In this regard, the bottom solid layer emerges first from the container as the bottom of the can is opened. This clearly teaches away from inversion of the layers upon serving as required by the claimed invention. See, *Docker*, column 4, lines 1-7.

With further reference to Figure 2, *Docker* clearly illustrates that the can can also be designed to have a bottom liquid constituent emerge first therefrom and then have the solid plop onto it. The plopping of the solid onto the liquid can cause the liquid layer to splash, thus creating a mess. This is a clear teaching away from the claimed invention which requires inversion of solid food pieces in gravy in an upper layer onto a solid foodstuff base layer before serving. As previously discussed, Applicants have recognized that the solid layer is inherently

more stable and thus reduces the risk of creating a mess upon opening the can because the solid layer is deposited from the can first and the solid pieces in gravy are then deposited on the solid layer.

With respect to *Waldburger*, Applicants question the applicability of this reference to the scope and content of the claimed invention. *Waldburger* merely relates to frozen food products that can be heated in a container and ready to serve. See, *Waldburger*, Abstract. Indeed, the *Waldburger* product is useful in hospitals and other institutions for the efficient and aesthetic purveying of standardized meals made up of several different hot dishes, such as an entrée and assorted vegetables but clearly not pet food. *Waldburger*, col. 1, lines 7-12. Therefore, Applicants question why one skilled in the art would even consider this reference in an attempt to remedy the efficiencies of the other cited references.

Applicants respectfully submit that the remaining references also do not remedy the deficiencies of the other references discussed above. The *Quaker Oats* reference does not disclose or suggest a layered structure. Indeed, the purported “two phase” product merely includes individual chunks in a substantially flowable medium, such as gravy. Moreover, one of the phases is completely surrounded by the other one.

The *QP Corp* references are concerned with bread-spread compositions in a container. By definition the spreads would be removed in small, discrete quantities. Thus, the issues that are faced by the claimed invention in providing a complete meal that can be attractively dispensed in its entirety from a can are not a concern with these references. Indeed, these references are merely concerned with putting the food in an attractive position within the container.

Moreover, with respect to *QP Corp* ('677), it should be noted that the viscosity of the components are 10-100 times greater than the viscosity of the components of the claimed invention. Thus, this product will not easily release from the can and must be withdrawn from the container by scooping small portions out with a suitable utensil. By contrast, the claimed invention can be dispensed from the container by a simple inversion of the can.

With respect to *Errass*, its clear emphasis relates to a condiment that can be dispensed from a tube. Nowhere does *Errass* disclose or suggest the stratified layering of pet food as required by the claimed invention.

Indeed, the *Henkel* reference relates to a cosmetic and not a food. Applicants respectfully submit that this reference would not even be considered by one skilled in the art. Regardless, the reference does not disclose horizontally stratified layers, let alone stratified pet food layers.

McGonigle discloses an apparatus which holds food to be heated in an oven. The apparatus consists of a compartmentalized lid which is inverted over a reusable dish and placed in an oven for heating. Foods placed in the lid are placed in an inverted manner. After the food is heated, the apparatus is inverted for serving.

However, nowhere does *McGonigle* disclose or suggest a pet food upper layer which is capable of supporting a pet food base layer when the pet food is inverted. *McGonigle*, in Col. 3, lines 52-54, mentions sauces that are intended to cover an entrée are placed in the lid first. There is no mention, however, of the entrée being able to support the sauce when inverted. In fact, it would be expected that the sauce would inter-mix with the entrée in the lid. Moreover, *McGonigle* discloses the separation of meal components into separate compartments when preparing the meal. Again, this clearly teaches away from the stratified pet food layers of the claimed invention.

Cease discloses a holder which receives frozen foods in an inverted manner. The holder is inverted on a service plate. *Cease* does not mention a canned product, let alone a canned pet food product. Nor does *Cease* mention filling a meal into a single compartment. *Cease* also does not include a gravy containing chunks. Thus, one of ordinary skill in the art would not be motivated to combine *Cease* with any of the other references to form the claimed invention.

Bliley discloses a method for preparing a frozen food package. A sauce is placed in a container and frozen. Another food, such as spaghetti, is placed in the same container and the container is again frozen. Upon serving, the container can be heated and inverted. While *Bliley* mentions a base layer and an upper layer, *Bliley* does not mention an upper layer that specifically provides support to a base layer when inverted for serving. In fact, it would not be expected that the spaghetti and sauce would remain separate after heating the container. On the contrary, it would be expected that some of the sauce would inter-mix with the porous spaghetti strands before and after inversion. Therefore, one of ordinary skill in the art would not be motivated to combine *Bliley* with any of the other references to form the claimed invention.

Stover discloses an ice cream package. The present invention, in contrast, is a pet food.

Applicants respectfully submit that this reference would not even be considered by one skilled in the art. Thus, one of ordinary skill in the art would not be motivated to combine *Stover* with any to the references to form the claimed invention.

Rogers teaches a food product having a gravy mixture including gelatin. The gravy mixture is placed in a container. A meat product is placed on top of the gravy mixture. *Rogers*, by the Patent Office's own admission, does not teach the inversion of a food product when serving the food product. *Rogers* teaches support of the meat by the gravy; however, *Rogers* does not teach the converse. *Rogers* also does not teach a canned food product directed to pets. Moreover, *Rogers* only teaches a single meat product which may disintegrate into chunks.

In view of same, Applicants do not believe that one skilled in the art would be inclined to modify any one or all of the primary references with the teachings of the secondary references in an attempt to arrive at the claimed invention. What the Patent Office clearly has done is simply to piece together the cited art by selectively picking and choosing teachings from same in an attempt to explain what the claimed invention discloses. Of course, the Court of Appeals for the Federal Circuit has criticized this motivation to combine analysis as being "hindsight reconstructive" because the motivation to combine the references was first disclosed in the present invention. *In re O'Farrell*, 853 F.2d 894, 902-903 (Fed. Cir. 1988).

Moreover, one skilled in the art might find it "obvious to try" the canned pet food product and process thereof of the claimed invention by, for example, providing an upper layer of a substantially solid foodstuff and a base layer of food pieces in a gravy such that upon inversion the substantially solid foodstuff layer supports the food pieces in gravy layer upon serving. However, an "obvious to try" analysis is not the proper standard under 35 U.S.C. §103. *In re Geiger*, 2 U.S.P.Q.2d 1276, 1278 (Fed. Cir. 1978). An "obvious to try" test would often defy patent protection to inventions growing out of well-planned research which is, of course, guided into those areas in which success is deemed most likely. *In re Lindell*, 155 U.S.P.Q. 521, 523 (CC Pa. 1967).

As previously discussed, Applicants have discovered a canned pet food product that includes a base layer with food pieces in a gravy and an upper layer that includes a substantially solid foodstuff such that upon inversion the upper layer can support the base layer for serving, thus providing a visually attractive product to facilitate eating thereof. Nowhere do any of the

cited references disclose or suggest the specific combination of features of the claimed invention, and nor do they recognize such beneficial effects thereof.

Indeed, the sheer number of references needed to support the Patent Office's rejection clearly suggests that the rejection is mere hindsight reconstruction of the claimed invention. If it takes this many separate references to piece together the claimed invention, then it must be non-obvious.

Further, the principal references are clearly deficient with respect to the specific features of the claimed invention, particularly with respect to a canned pet food product that has an upper layer with a substantially solid foodstuff and a base layer with solid food pieces in gravy such that upon inversion the solid foodstuff layer can support the food pieces in gravy layer, thus making the pet food product more visually attractive for serving and eating purposes.

Moreover, Applicants do not believe that the secondary references can be relied upon in any combination to remedy the deficiencies of the principal references. Indeed, a number of these references do not even relate to pet food products, and at least one (e.g., *Henkel*) that does not even relate to food products let alone pet food products. Therefore, Applicants believe that the obviousness rejection with respect to claims 1-10 are clearly improper as a matter of law or fact.

For the foregoing reasons Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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